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No. 86-525

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner Pan American World Airways, Inc. ("Pan Am") filed the Petition

for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit that it lacked jurisdiction over Pan Am's appeal from an order refusing to enter a consent decree that would have settled an employment discrimination action. Pan Am contends that the order was appealable under 28 U S.C. § 1292(a)(1) as a denial of injunctive relief or, in the alternative, under 28 U.S.C. § 1291 as a "collateral order."

Pursuant to Supreme Court Rule 22.5, Pan Am files this Reply Brief in Support of the Petition for Writ of Certiorari to respond to two issues raised in the Opposition of Former Pan American Pilots/Claimants to Petition for Writ of Certiorari

("Pilots/Claimants Br.") and one issue raised in the Brief of the NAL Chapter, Flight Engineers International Association, in Opposition ("NAL Br.").[1] First, citing no authority, Claimants assert that "this case presents an occasion in which interlocutory appellate review is not likely to lead to a different result." Pilots/Claimants Br. p. 32 (emphasis in original). Second, the NAL flight engineers argue that the Ninth Circuit rule, which allows plaintiffs and not

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1 The district court granted Claimants and the NAL flight engineers leave to intervene for the limited purpose of objecting to the terms of the consent decree. Petition for Writ of Certiorari A-30-33. The Equal Employment Opportunity Commission, Pan Am, and the collective bargaining representatives of the affected employees are the only true parties to this action.

defendants to appeal the same order, is justified by the fact that employment discrimination statutes do not protect employer defendants. Finally, Claimants contend that the petition for writ of certiorari fails to raise a recurring question of federal law. Pan Am respectfully submits that such contentions are in error.

I. If the Court of Appeals had Exercised Jurisdiction Over the Appeal, It Might Well Have Concluded that the District Court Erred in Refusing to Enter the Consent Decree.

Claimants erroneously claim that, even if the Ninth Circuit exercised appellate jurisdiction, the result would not change. Pan Am contends that the

District Court should have deferred to the Equal Employment Opportunity Commission's ("EEOC") exercise of the discretion delegated by Congress in the Age Discrimination in Employment Act ("ADEA") to settle this action. See Petition for Writ of Certiorari p. 7 n.8. That position is supported by the language and enforcement scheme of the ADEA and the only authority on point.

The EEOC may bring actions to enforce the ADEA. See 29 U.S.C. § 626. In bringing ADEA enforcement actions, the EEOC, as a federal agency, represents both the public interest and the affected employees. In view of that dual role, the EEOC and the employees almost inevitably have somewhat divergent interests in settling a dispute. The ADEA's enforcement scheme copes with

that potential problem by vesting sole discretion in the EEOC to settle a lawsuit that it has brought.

Section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1), provides that:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter. (emphasis added).

Section 7's limitation on private rights "manifests a congressional intent to place the EEOC's conduct of ADEA enforcement proceedings beyond the interference of private non-party individuals . . . ."

EEOC v. Consolidated Edison Co.,
557 F. Supp. 468, 471 (S.D.N.Y. 1983).[2]

Because the ADEA places the exclusive authority to litigate a case in the hands of the EEOC, the district court should have deferred to the EEOC's reasoned decision to settle its action against Pan Am. The only two courts that have confronted the question have adopted this position.

In EEOC v. Consolidated Edison Co., 557 F. Supp. 468 (S.D.N.Y. 1983), the court held that employees could not object to the terms of a consent decree settling an ADEA

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2 See also H.R. Rep. No. 805, 90th Cong., 1st. Sess. (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2213, 2218 (stating that Section 7 is designed to enable the EEOC "to discharge [its] responsibilities to achieve to the optimum the purposes of the act . . . .").

action brought by the EEOC against Consolidated Edison. The court emphasized that

> [t]his suit is not a class action nor does it fall within any other of the limited categories of cases in which a Court is called upon to determine the fairness or desirability of a proposed settlement. In approving this settlement, this Court merely acknowledges that the parties have exercised the right, which they have, to discontinue this litigation.

557 F. Supp. at 470 (emphasis added).

Similarly, the court in EEOC v. Eastern Air Lines, Inc., 97 F.R.D. 646 (S.D. Fla. 1983), appeal dismissed, 736 F.2d 635 (11th Cir. 1984), rejected the argument that the EEOC failed adequately to protect the interests of claimants in negotiating a consent decree with Eastern Air Lines and denied the claimants' motion

to intervene. The court allowed the parties to the action -- Eastern Air Lines and the EEOC -- to settle the lawsuit on mutually agreeable terms.[3]

Both Consolidated Edison and Eastern Air Lines stand for the proposition that, after the EEOC has filed an ADEA action, the individuals on whose behalf the EEOC brought the suit have no legal right to preclude consummation of a settlement. Claimants cryptically challenge the authority of these cases. See Pilots/Claimants Br. p. 35 n.10. However,

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3 In reviewing the ADEA's enforcement scheme, the court emphasized that "[e]vidently, regardless how substantial the interest of any single litigant, that interest must yield to the larger interest served by EEOC when it proceeds on behalf of that litigant." 97 F.R.D at 649.

in the court below, Claimants failed to cite even one case under the ADEA that is contrary to Consolidated Edison or Eastern Air Lines and relied exclusively on cases applying the fairness standard of Fed. R. Civ. P. 23(e) in reviewing class action settlements.

In this case, the district court subjected the monetary settlement reached by Pan Am and the EEOC to a strict Rule 23 fairness standard -- a standard that is inconsistent with the enforcement scheme of the ADEA and Consolidated Edison and Eastern Air Lines. Because it had jurisdiction under 28 U.S.C. §§ 1291, 1292, the Ninth Circuit should have decided whether the district court erred in doing so. In short, appellate review might well lead to

a different result -- entry of the consent decree settling this action.

II. Defendants, as well as Plaintiffs, Should Be Permitted to Appeal an Order Refusing to Enter a Consent Decree.

In this case, the Ninth Circuit expressly held that Carson v. American Brands, Inc., 450 U.S. 79 (1981), applies only when plaintiffs appeal from denial of a joint motion to enter a consent decree containing injunctive relief. The NAL flight engineers attempt to justify the rule that plaintiffs but not defendants can appeal the same order on the grounds that employment discrimination statutes protect plaintiff employees and not defendant employers. NAL Br. pp. 6-7. However,

voluntary settlement of employment discrimination actions is in the interest of employers as well as employees.[4] The fact that the ADEA prohibits certain types of age discrimination by employers and labor organizations against employees does not change this fundamental policy. By allowing plaintiffs but not defendants to appeal a district court order refusing to

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4 Claimants' suggestion that there is no policy favoring voluntary settlement of ADEA actions, Pilots/Claimants Br. pp. 33-35, is puzzling. To avoid the waste of judicial and private resources, settlement is favored over litigation. Any argument to the contrary is nonsensical. Moreover, by requiring the EEOC to resolve alleged violations of the ADEA by "informal methods," 29 U.S.C. § 626(a), the statute demonstrates the congressional intent to facilitate settlement of ADEA actions.

enter their jointly proposed consent decree, the Ninth Circuit's decision is contrary to the policy favoring voluntary settlement. In short, there is no justification for a rule that allows plaintiffs but not defendants to appeal the same order.

III. The Petition for Writ of Certiorari Raises a Recurring Question of Law.

In contending that this Court should deny the petition for writ of certiorari, the Claimants boldly assert that "[t]he instant case presents an unusual non-recurring situation." Pilots/Claimants Br. p. 26.[5] However, the issue presented to

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5 The NAL flight engineers also contend that the jurisdictional question is not a recurring one. NAL Br. p.10.

this Court almost certainly will arise again and will have a direct impact on numerous actions in the future. Moreover, defendants seeking to settle actions will be at a serious disadvantage in settling actions in the future if the Ninth Circuit's decision is allowed to stand.

Because the Ninth Circuit rule allows only plaintiffs to appeal from denial of a joint motion to enter a consent decree, whenever a district court finds that the monetary portion of a consent decree is inadequate, plaintiff will lack incentive to appeal that order. Plaintiff instead can utilize the district court's disapproval of the consent decree as a lever and seek a larger monetary award from defendant in subsequent negotiations. Defendant,

under the rule enunciated by the Ninth Circuit, cannot appeal and is left no alternative but to pay more money or proceed to trial. Defendants therefore will no doubt repeatedly be placed in this disadvantaged position by plaintiffs.

In short, the jurisdictional question raised by Pan Am is a significant legal question and is likely to recur; despite the suggestion of Claimants, it is not one of merely academic interest.[6] Moreover,

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6 Furthermore, the NAL flight engineers' suggestion that Pan Am somehow "waived" the right to argue that appellate jurisdiction is proper under Section 1291 is erroneous. Contrary to the NAL flight engineers' statement, NAL Br. pp. 10-11 n.7, the collateral order doctrine was asserted as a basis for jurisdiction in the docketing statement submitted by Pan Am with the Ninth Circuit. In addition, the question whether

(footnote continued)

the practical effects of the Ninth Circuit's decision directly affects Pan Am's ability to settle this case with the EEOC. Accordingly, this Court should grant the petition for writ of certiorari. See Sup. Ct. R. 17.1(a).

(footnote continued from previous page) jurisdiction was appropriate under that section was briefed by the parties. In any event, even if the parties failed to raise the issue, the Ninth Circuit was obligated to determine whether, and on what basis, it had jurisdiction over the appeal. See Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379 (1884); Capron v. Van Noorden, 6 U.S. (2 Cranch.) 125 (1804). Here, the Ninth Circuit expressly held that it lacked jurisdiction over the appeal under Section 1291. Petition for

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, petitioner Pan American World Airways, Inc. respectfully requests that this Court grant the petition for writ of certiorari.

Dated: November 6, 1986

Respectfully submitted,

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